No. 22-888

In the Supreme Court of the United States

JAMES R. RUDISILL,
Petitioner,
v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF JEREMY C. DOERRE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an attorney who believes that this case involves an issue of exceptional importance to veterans. Amicus' only interest is in highlighting a point that may have been overlooked in the lower court opinion in case it will be helpful to this Court's consideration. Amicus has no stake in any party or in the outcome of this case.

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Post-9/11 GI Bill includes two separate clauses granting entitlement to Chapter 33 educational assistance (sometimes referred to as Post-9/11 benefits). See 38 U.S.C. § 3311(a); 38 U.S.C. § 3327(d)(1).

Both the Federal Circuit majority opinion and the government appear to suggest that a limitation contained in 38 U.S.C. § 3327(d)(2) can operate to constrain any entitlement to Chapter 33 educational assistance. This conclusion overlooks that, by the plain text of the statute, only entitlement under 38 U.S.C. § 3327(d)(1) is "subject to" the limitation of 38 U.S.C. § 3327(d)(2) – entitlement to educational assistance under 38 U.S.C. § 3311(a) is not.

Given the explicit indication that entitlement under 38 U.S.C. § 3327(d)(1) is "subject to" 38 U.S.C. § 3327(d)(2), and the lack of any similar indication for entitlement under 38 U.S.C. § 3311(a), the government could at best argue that there is an ambiguity as to whether entitlement under 38 U.S.C. § 3311(a) is subject to 38 U.S.C. § 3327(d)(1). However, even assuming arguendo such an ambiguity, this would be exactly the type of ambiguity that could be resolved under the pro-veteran canon. See *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

Moreover, if the government sought to argue that the limitation of 38 U.S.C. § 3327(d)(2) should nonetheless apply to entitlement under 38 U.S.C. §

3311(a), this would set up a conflict between 38 U.S.C. § 3327(d)(2) and 38 U.S.C. § 3312(a), suggesting that such a construction is to be avoided. See *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 370 (1986).

Overall, both the plain text of the statute and canons of statutory construction suggest that entitlement to educational assistance under 38 U.S.C. § 3311(a) is not constrained by the limitation of 38 U.S.C. § 3327(d)(2).

Here, the Petitioner served on active duty from June 2004 to December 2005 and from November 2007 to August 2011. Pet. App. 82a. These periods of service entitle the Petitioner to Chapter 33 educational assistance under 38 U.S.C. § 3311(a). Because this entitlement is under 38 U.S.C. § 3311(a) and not 38 U.S.C. § 3327(d)(1), it is not constrained by the limitation of 38 U.S.C. § 3327(d)(2).

ARGUMENT

I. The decision below overlooks that only entitlement under 38 U.S.C. § 3327(d)(1) is "subject to" the limitation of 38 U.S.C. § 3327(d)(2) -- entitlement to educational assistance under 38 U.S.C. § 3311(a) is not.

The Post-9/11 GI Bill (codified in Chapter 33 of Title 38) includes two separate clauses granting entitlement to Chapter 33 educational assistance (sometimes referred to as Post-9/11 educational assistance or Post-9/11 benefits).

Both the Federal Circuit majority opinion and the government appear to suggest that a limitation contained in 38 U.S.C. § 3327(d)(2) can operate to constrain any entitlement to Chapter 33 educational assistance. This conclusion overlooks that, of the two separate clauses in the Post-9/11 GI Bill granting entitlement to educational assistance, only one of these is "subject to" the limitation of 38 U.S.C. § 3327(d)(2).

A. The first clause granting entitlement is contained in 38 U.S.C. § 3311, and provides that "[s]ubject to subsections [not applicable here], each individual described in subsection (b) is entitled to educational assistance under this chapter." 38 U.S.C. § 3311(a). For example, subsection (b) encompasses an individual who "commencing on or after September

11, 2001, serves an aggregate of at least 36 months on active duty in the Armed Forces." 38 U.S.C. § 3311(b).

The second clause granting entitlement is contained in 38 U.S.C. § 3327, and allows a veteran to receive entitlement to Chapter 33 educational assistance by electing to give up unused entitlement to educational assistance under another chapter. Specifically, 38 U.S.C. § 3327(d)(1) provides that, "[s]ubject to paragraph (2)…, an individual making [such] an election … shall be entitled to educational assistance under this chapter in accordance with the provisions of this chapter, instead of basic educational assistance under chapter 30 of this title."

B. Thus, both 38 U.S.C. § 3311(a) and 38 U.S.C. § 3327(d)(1) grant "entitle[ment] to educational assistance under this chapter."

38 U.S.C. § 3312(a) specifies that, "[s]ubject to [a 48-month aggregate cap] and except as provided in subsections [not relevant here], an individual entitled to educational assistance under this chapter is entitled to a number of months of educational assistance under section 3313 equal to 36 months."

Importantly, however, the grant of entitlement in 38 U.S.C. § 3327(d)(1) is "subject to paragraph (2)," i.e. 38 U.S.C. § 3327(d)(2), which limits the number of months of Chapter 33 entitlement bestowed by 38 U.S.C. § 3327(d)(1) based on the number of months of unused Chapter 30 entitlement. The explicit qualification of the entitlement grant in 38 U.S.C. § 3327(d)(1) as being "[s]ubject to paragraph 2" is

important because absent this qualification the grant of entitlement to educational assistance in 38 U.S.C. § 3327(d)(1) would trigger entitlement to 36 months of Chapter 33 educational assistance per 38 U.S.C. § 3312(a). Because the grant of entitlement in 38 U.S.C. § 3327(d)(1) is "[s]ubject to paragraph 2", the limitation of 38 U.S.C. § 3327(d)(2) can constrain entitlement under 38 U.S.C. § 3327(d)(1) so as to in some circumstances supersede 38 U.S.C. § 3312(a).

In sharp contradistinction to 38 U.S.C. § 3327(d)(1), the grant of entitlement in 38 U.S.C. § 3311(a) is not "subject to" 38 U.S.C. § 3327(d)(2). This is easily seen from a comparison of the plain text of 38 U.S.C. § 3327(d)(1) and 38 U.S.C. § 3311(a).

Thus, the plain text itself suggests that entitlement to educational assistance under 38 U.S.C. § 3311(a) is not constrained by the limitation of 38 U.S.C. § 3327(d)(2).

C. Given the explicit indication that entitlement under 38 U.S.C. § 3327(d)(1) is "subject to" 38 U.S.C. § 3327(d)(2), and the lack of any similar indication for entitlement under 38 U.S.C. § 3311(a), the government could at best argue that there is an ambiguity as to whether entitlement under 38 U.S.C. § 3311(a) is subject to 38 U.S.C. § 3327(d)(1).

However, even assuming arguendo such an ambiguity, this would be exactly the type of ambiguity that could be resolved under the pro-veteran canon that "interpretive doubt is to be resolved in the

veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

D. Moreover, because the grant of entitlement in 38 U.S.C. § 3311(a) is not "subject to" 38 U.S.C. § 3327(d)(2), there is no mechanism in the text to allow this limitation to supersede or constrain entitlement to 36 months of Chapter 33 educational assistance per 38 U.S.C. § 3312(a).

If the government sought to argue that the limitation of 38 U.S.C. § 3327(d)(2) should nonetheless apply to entitlement under 38 U.S.C. § 3311(a), this would only set up a conflict between 38 U.S.C. § 3312(a) and 38 U.S.C. § 3327(d)(2).

Thus, such a government-sought construction would be contrary to "the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict." *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 370 (1986) (citing *Washington Market Co. v. Hoffman*, 101 U.S. 112 (1879)).

Further, this conflict would again present an ambiguity that could be resolved under the pro-veteran canon.

E. Overall, both the plain text of the statute and canons of statutory construction suggest that entitlement to educational assistance under 38 U.S.C.

§ 3311(a) is not constrained by the limitation of 38 U.S.C. § 3327(d)(2).[2]

II. The Petitioner's periods of service from 2004 to 2011 entitle him to educational assistance under 38 U.S.C. § 3311(a) that is not constrained by 38 U.S.C. § 3327(d)(2).

Here, the Petitioner "served on active duty as an enlisted person in the U.S. Army from January 2000 to June 2002." Pet. App. 81a-82a.

Because he already credited that service to entitlement to Chapter 30 basic educational assistance under the Montgomery GI Bill, his ability to use that period of service to establish entitlement to Chapter 33 educational assistance under 38 U.S.C. § 3311 is constrained by 38 U.S.C. § 3322(h)'s "bar to duplication of eligibility based on a single event or period of service." 38 U.S.C. § 3322(h) (capitalization removed).

However, the Petitioner also served "[f]rom June 2004 to December 2005 … on active duty as an

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[2] Amicus urges that this construction can be considered irrespective of whether the Petitioner has previously raised it, as "once an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties, but retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

enlisted person with an Army National Guard unit, through which he deployed to Iraq," and served "from November 2007 to August 2011… [on] active duty in the U.S. Army … as a commissioned officer, and [] deployed to Iraq and Afghanistan." Pet. App. 82a.

By the plain text of the statute, these subsequent periods of service entitle the Petitioner to Chapter 33 educational assistance under 38 U.S.C. § 3311(a).[3]

Despite this, both the Federal Circuit majority opinion and the government have concluded that any entitlement of the Petitioner to Chapter 33 educational assistance (including for his periods of service from 2004 to 2011) is limited by 38 U.S.C. § 3327(d)(2). This conclusion overlooks that, while entitlement to Chapter 33 educational assistance under 38 U.S.C. § 3327(d)(1) is "subject to" the limitation of 38 U.S.C. § 3327(d)(2), entitlement to Chapter 33 educational assistance under 38 U.S.C. § 3311(a) is not subject to this limitation.

Amicus urges that the Petitioner's periods of service from June 2004 to December 2005 and from November 2007 to August 2011 entitle him to

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[3] The Petitioner urges as much, citing to § 3311(a)–(b) in asserting that "Petitioner's subsequent periods of intermittent service between June 2004 and August 2011 meet all qualifying service criteria under the Post-9/11 GI Bill." Pet. at 26; see also Brief for Petitioner at 41.

educational assistance under 38 U.S.C. § 3311(a) that is not constrained by 38 U.S.C. § 3327(d)(2).[4]

III. The Petitioner should be able to elect to receive educational assistance based on his entitlement under 38 U.S.C. § 3311(a) rather than based on entitlement under 38 U.S.C. § 3327(d)(1).

Amicus further urges that where Congress has granted a veteran entitlement to educational assistance under 38 U.S.C. § 3311(a), any attempt to foreclose by regulation or administrative process the option to elect that entitlement is necessarily futile. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

Thus, the Petitioner should be able to elect to receive educational assistance based on his entitlement under 38 U.S.C. § 3311(a) for his periods of service from 2004 to 2011, rather than based on

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[4] Amicus notes that, although this entitlement would not be constrained by 38 U.S.C. § 3327(d)(2), it would still be constrained by the 48-month aggregate cap of 38 U.S.C. § 3695, because the 36-month entitlement of 38 U.S.C. § 3312(a) is explicitly "[s]ubject to section 3695."

entitlement under 38 U.S.C. § 3327(d)(1) for prior service. [5] [6]

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[5] Amicus notes that 38 U.S.C. § 3322(d) cannot be interpreted as governing or constraining this choice. Section 3322(d) references "educational assistance under [other chapters] … or the provisions of the Hostage Relief Act of 1980," and speaks to "coordination of entitlement to educational assistance under [] chapter [33], on the one hand, and such [other] chapters or provisions, on the other." 38 U.S.C. § 3322(d) does not speak to or govern coordination of entitlement under different sections of Chapter 33, and thus cannot constrain a veteran's ability to choose between receiving educational assistance based on entitlement under 38 U.S.C. § 3311(a) and receiving educational assistance based on entitlement under 38 U.S.C. § 3327(d)(1).

[6] Amicus would suggest that, if a veteran is entitled to 36 months of Chapter 33 educational assistance under 38 U.S.C. § 3311(a) but has already received some number of months of Chapter 33 educational assistance based on entitlement under 38 U.S.C. § 3327(d)(1), the number of months for which Chapter 33 educational assistance was already received would of course be counted against the 36 months of entitlement. Accordingly, the total number of months of Chapter 33 educational assistance a veteran would be able to receive would be 36, with the actual number being potentially further constrained by the 48-month aggregate cap of 38 U.S.C. § 3695.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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